seeking release of comments on the rules governing military commissions. *National Institute of Military Justice v. Dep't of Defense*, 2005 WL 3440832 (D.D.C. Dec. 16, 2005).

Although many of NIMJ's directors and advisors have written and spoken publicly in their individual capacities concerning the military commissions, NIMJ itself has not, until now, taken a position with respect to the commissions' legality or desirability. NIMJ has, however, opposed calls for a boycott of the commissions by the civilian defense bar, *see* NIMJ, Statement on Civilian Participation as Defense Counsel in Military Commissions, July 11, 2003, in MILITARY COMMISSION INSTRUCTIONS SOURCEBOOK 2d 198 (2004), and has recommended several procedural improvements, including the use of notice-and-comment rulemaking, public availability of rulemaking comments, creation of an electronic case filing system, and establishment of a Clerk's Office.

The Bar Association of the District of Columbia ("BADC"), established in 1871, is the second oldest voluntary bar association in the United States. Throughout its history, the BADC has promoted the public interest by providing leadership and direction to the District of Columbia and its legal community. The BADC has testified before Congress, various committees, and commissions considering developments in the law.

The BADC has taken an active interest in military law, providing a civilian bar association perspective to military law issues affecting the armed forces and military servicemembers. For example, the BADC submitted comprehensive comments to the Commission on the 50th Anniversary of the Uniform

Code of Military Justice (the "Cox Commission"), suggesting changes in the Uniform Code of Military Justice.

SUMMARY OF ARGUMENT

Petitioner is entitled to relief because the military commission before which respondents propose to try him is invalid under Army Regulation 190-8 and the Third Geneva Convention, which entitle persons whose prisoner of war status never has been decided by a proper tribunal to trial by court-martial, and because the President has derogated without justification from generally recognized principles of law and rules of evidence, in violation of Article 36(a) of the Uniform Code of Military Justice, ¶ 2(b)(2) of the *Manual for Courts-Martial*, and fundamental domestic and international laws relating to armed conflict.

ARGUMENT

I

Federal and international law mandates that petitioner, whose status never has been determined by a "competent tribunal," be tried by court-martial

Trial of petitioner before the military commission would violate federal law – that is, a regulation duly promulgated in accordance with Convention (No. III) Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316 (1949) ("GPW" or "Third Geneva Convention") – which requires that unless a "competent tribunal" decides a detainee's legal

status, the detainee is entitled to trial by regular court-martial.[1]

A

Army Regulation 190-8 establishes this requirement as a matter of United States law

Appropriate "treatment, care, accountability, legal status, and administrative procedures" respecting persons in U.S. military custody are detailed in Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees (1997) ("AR 190-8"), jointly published by the Army, Navy, Air Force, and Marine Corps. The regulation implemented a Department of Defense directive outlining a "Program for Enemy Prisoners of War (EPOW) and Other Detainees"; that is, for anyone whom U.S. forces detain in armed conflict or in "operations other than war." DoD Directive 2310.1 at 1 (1994); *id.* § 1.1. *See* AR 190-8 at i; *id.* ¶ 1-1(b) (including within scope of regulation "those persons held during military operations other than war"). The directive was issued pursuant to a congressional grant to the President of discretion to "prescribe regulations to carry out his functions, powers, and duties" related

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[1] In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), this Court put to one side the President's assertion of powers inherent in the Commander-in-Chief Clause, U.S. CONST. art. II, § 2, and instead assessed the validity of executive detention in light of positive law. This brief likewise pretermits discussion of what the President may do without congressional authorization – when his power is weakest, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) – and focuses on whether the executive action under review comports with statutes, regulations, and treaties of the United States.

to the armed forces. 10 U.S.C. § 121; *cf. Loving v. United States*, 517 U.S. 748, 759-68 (1996) (holding that Congress, to which U.S. CONST. art. I, § 8, cl.14, gives the power "[t]o make Rules for the Government and Regulation of the land and naval Forces," may assign to the President responsibility to promulgate military regulations). This regulation is the law of the United States, binding on all federal officials. This Court confirmed the obligatory legal nature of military regulations well over a century ago. *Gratiot v. United States*, 45 U.S. (4 How.) 80, 117 (1846) ("As to the army regulations, this court has too repeatedly said, that they have the force of law ...."); *see also Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 390 (1944); *Standard Oil Co. of California v. Johnson*, 316 U.S. 481, 484 (1942); *United States v. Freeman*, 44 U.S. (3 How.) 556, 567 (1845).

AR 190-8 is comprehensive, spanning more than thirty single-spaced pages of small type plus nearly fifty pages of sample forms. It sets precise limits on prosecution: an "enemy prisoner of war" typically must be tried by court-martial; the sole alternative forum is an ordinary criminal court. AR 190-8 ¶ 3-7(b). The court-martial must adhere to the Uniform Code of Military Justice, 10 U.S.C. §§ 801-946 ("UCMJ"), and to the *Manual for Courts-Martial, United States*. AR 190-8 ¶ 3-7(b); *cf.* UCMJ art. 2(a)(9), 10 U.S.C. § 802(a)(9) (including as "persons ... subject to this chapter ... [p]risoners of war in custody of the armed forces").[2] AR 190-8 guarantees certain

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[2] "[D]etailed benchbooks for courts-martial" in conformance with AR 190-8 and the Third Geneva Convention were published in October 2004, but there has been no public release of any similar guide for the military commissions. Eugene

rights explicitly; *inter alia* the United States may neither exert "moral or physical coercion ... to induce" an enemy prisoner of war "to admit guilt for any act," nor prosecute an enemy prisoner of war "for an act that was not forbidden by U.S. law or by international law in force at the time the act was committed." AR 190-8 ¶ 3-8(a)-(b). Any sentence resulting from court-martial may be appealed, and even if appeal is waived, the sentence must be reviewed. *Id.* ¶ 3-8(h).

AR 190-8 states that the meaning of "enemy prisoner of war" – a term it abbreviates "EPW" – is equivalent to that of "prisoner of war" in the Third Geneva Convention. *Id.*, Glossary, at 33 (citing GPW arts. 4-5). The regulation defines EPW as "[i]n particular, one who, while engaged in combat under orders of his or her government, is captured by the armed forces of the enemy," and thus "is entitled to the combatant's privilege of immunity from the municipal law of the capturing state for warlike acts which do not amount to breaches of the law of armed conflict." *Id.* It then provides a nonexhaustive list of divers captives who qualify:

> [A] prisoner of war may be, but is not limited to, any person belonging to one of the following categories who has fallen into the power of the enemy: a member of the armed forces, organized militia or volunteer corps; a person who accompanies the armed forces without

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R. Fidell, Dwight H. Sullivan & Detlev F. Vagts, *Military Commission Law*, ARMY LAWYER 47, 50 (Dec. 2005), *available at*: http: //www. jagcnet. army. mil/ JAGCNET INTERNET/ HOMEPAGES /AC/TJAGSAWEB.NSF / Main?OpenFrameset.

> actually being a member thereof; a member of a merchant marine or civilian aircraft crew not qualifying for more favorable treatment; or individuals who, on the approach of the enemy, spontaneously take up arms to resist invading forces.

Id. Anticipating that a detainee's status may prove difficult to ascertain, AR 190-8 designates the means by which all such questions must be resolved:

> A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

Id. ¶ 1-6(b). This "competent tribunal" comprising "three commissioned officers, one of whom must be of a field grade," shall follow particular procedures. *Id.* ¶ 1-6(c), (e). Ordinarily, its "[p]roceedings shall be open," recorded in writing, and take place in the detainee's presence. *Id.* ¶ 1-6(e)(2), (3), (5). The detainee shall be permitted to call witnesses, to question tribunal witnesses, and, if desired, to "testify or otherwise address the Tribunal," which must determine the detainee's status by a preponderance of the evidence. *Id.* ¶ 1-6(e)(6)-(9). The record "shall be reviewed for legal sufficiency" should the tribunal deny EPW status. *Id.* ¶ 1-6(g). Until this process is completed, the detainee is entitled to all benefits of the

Third Geneva Convention. *Id.* ¶ 1-6(a) ("In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."); *see id.* ¶ 1-5(a)(2) (declaring "U.S. policy" that "[a]ll persons taken into custody by U.S. forces will be provided with the protections of the GPW until some other legal status is determined by competent authority"). *Cf.* DoD Directive 2310.1 § 3.3 (stating "DoD policy" that "[c]aptured or detained personnel shall be accorded an appropriate legal status under international law").

B

AR 190-8 not only stands on its own as U.S. law, but also demonstrates the U.S. understanding of its obligations under the Third Geneva Convention and implements that Convention, should an act of implementation be necessary

The provisions of AR 190-8 under discussion, which constitute U.S. law, comply with requirements established fifty-six years ago in the Third Geneva Convention. The regulation's mandate of trial by court-martial or by civil court – either of which must follow set procedures – accords with the Convention's requirement that prisoners of war "can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of

the present Chapter have been observed." GPW art. 102; *cf.* AR 190-8 ¶ 3-7(b). The regulation's procedures for appeal satisfy the terms of the Convention. *Compare* AR 190-8 ¶ 3-8(h) *with* GPW art. 106. In expressly proscribing coerced confession and *ex post facto* prosecution, the regulation tracks the Convention almost verbatim. *Compare* AR 190-8 ¶ 3-8(a)-(b) *with* GPW art. 99. The regulatory term "enemy prisoner of war" is to be construed "as defined in Articles 4 and 5 of the Geneva Convention." AR 190-8, Glossary, at 33. Finally, the regulation, like the Convention, requires that if legal status is in doubt, detainees "shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." GPW art. 5; *see* AR 190-8 ¶ 1-6(a). *See also Hamdi v. Rumsfeld*, 542 U.S. 507, 549-51 (2004) (Souter, J., concurring in part and dissenting in part) (noting that regulation thus "incorporates" GPW).

This symmetry of domestic and international law is a consequence of codification efforts begun in the mid-1800s. *See* THE LAWS OF ARMED CONFLICTS vii-viii (Dietrich Schindler & Jiří Toman eds., 3d ed. 1988) ("Schindler & Toman"). Protection of wartime captives was memorialized in, for example, the Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 2 Bevans 932.[3] But

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[3] By midcentury Geneva protections were a part of America's national culture. *Cf. Dickerson v. United States*, 530 U.S. 428, 443 (2000) (declining to overrule midcentury holding respecting interrogation, which had "become part of our national culture"). A Broadway play about an American prisoner of war charged with burning a Nazi train included this exchange:

> GENEVA MAN: ... As long as I'm here I'll investigate this matter.

World War II exposed gaps in that law, and so led to adoption in 1949 of four new Conventions.[4] Today the four treaties have 192 parties, including virtually all the member states of the United Nations as well as entities like the Holy See. Int'l Comm. Red Cross, *International Humanitarian Law - Treaties and Documents,* http:// www.icrc.org/ihl.nsf/ CONVPRES? Open View. This widespread embrace exemplifies the principles of humanity and reciprocity that animate humanitarian law: by the act of ratification each state party not only endorses humane treatment of persons caught in the throes of warfare, but also acknowledges that by pledging to treat others' nationals fairly it helps to assure fairness for its own nationals.

A seminal source of these principles is the United States; to be specific, the war code that the United States promulgated in 1863. Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (Apr. 24, 1863) ("Lieber Code"); *see Geneva Conventions for the Protection of War Victims: Hearing Before the Comm. on Foreign*

PRICE: We'd appreciate it, sir.

GENEVA MAN: That is what the Geneva Conference is for. We protect your rights. ... [D]on't worry. It will be a fair trial.

DONALD BEVAN & EDMUND TRZCINSKI, STALAG 17 55-56 (1951).

[4] Schindler & Toman, *supra*, at viii. Drafted in addition to GPW were the Convention (No. I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3114; the Convention (No. II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217; and the Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516.

Relations of the U.S. Senate, 84th Cong. 6 (1955) ("*Hearing*") (statement of Wilber M. Brucker, General Counsel, Department of Defense). Drafted on request of President Abraham Lincoln by a law professor who had served in the Prussian Army during the Napoleonic Wars and whose sons fought on either side of America's Civil War, the Lieber Code stands out as an "extraordinarily enlightened" application of reciprocity and humanity to international and to irregular wars. Theodor Meron, *Francis Lieber's Code and Principles of Humanity*, 36 COLUM. J. TRANSNAT'L L. 269, 269-79 (1997). The Code proclaimed that military law must "be strictly guided by the principles of justice, honor and humanity – virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed." Lieber Code art. 4. Just treatment was to be preferred as a means to promote "[t]he ultimate object of all modern war": "a renewed state of peace." *Id.* art. 29, *cited in* Schindler & Toman, *supra*, at x (explaining that laws of war advance "mutual interest" and "understanding after the end of the conflict"). In service of these principles, the Code admitted no justification for "cruelty," such as "torture to extort confessions," even against captured enemies. *Id.* art.16; *see id.* arts. 56, 80. It accorded a myriad of captives – soldiers and officers, members of mass uprisings, rebels, partisans, contractors, and other camp followers – treatment as "prisoners of war" irrespective of the United States' view of the enemy. *Id.* arts. 49-51, 67, 81, 152-53. Criminal cases governed by statute were to be tried by courts-martial; others could be tried by military commissions, but only if proceedings conformed to "the common law of war." *Id.* art. 13. The Code had influence on the 1949 Geneva Conventions, Meron,

supra, at 279, and U.S. ratification of those treaties was swift.[5]

"Treaties made ... under the Authority of the United States, shall be the supreme Law of the Land," U.S. CONST. art. VI, cl. 2. This Court established nearly two centuries ago that a treaty "is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision." *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.). A treaty so operates when it concerns individual rights, a matter well within the purview of the courts. *See id.* at 307. But if treaty terms are not self-executing – if they "import a contract" of future promises – "the legislature must execute the contract before it can become a rule for the Court." *Id.* at 314. To determine whether the United States intended a provision to have direct domestic effect, courts examine the treaty itself and official statements about the treaty. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 111, cmt. h (1987) ("RESTATEMENT").

By application of these precepts the relevant provisions of the Third Geneva Convention merit immediate enforcement by this Court. The Convention's requirements that prisoners of war be tried only by specified courts applying valid

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[5] Ratifying the treaties on Aug. 2, 1955, the United States attached two reservations; neither applied to the Third Geneva Convention or to treatment of enemy captives. Int'l Comm. Red Cross, *Geneva Conventions of 12 August 1949. United States of America*, http://www.icrc.org/ihl.nsf/NORM/D6B53F5B5D14F35AC1256402003F9920?OpenDocument.

substantive law and adhering to set procedures, that captors may not force confessions, and that captives of questioned status shall be protected, concern the sort of fundamental individual rights to which courts are obliged to give effect. The Convention itself says as much: "Prisoners of war may in no circumstances renounce in part or in entirety the *rights secured to them by the present Convention*," GPW art. 7 (emphasis added); *see id.* art. 6. *See also* JEAN PICTET, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS 17 (1975) (stating, in monograph by a leading Red Cross delegate to the 1949 drafting conference, "The Geneva texts were drawn up solely for the benefit of the individual."); *id.* at 22. The United States, which signed on the very day that the Convention was concluded, 1 FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 278 (1949), "played a major role" in drafting such language. *Hearing*, *supra*, at 3 (statement of Robert Murphy, Deputy Under Secretary of State); *see id.* (Brucker statement) at 7 ("Military interests were thus given proper consideration throughout the preparation of the conventions.").

In 1955, executive officials successfully urged the Senate to approve the Convention "to confirm our support of a humanitarian cause and to extend the protection of the conventions to our own citizens should it ever become necessary." *Id.* (Murphy statement) at 2; *see id.* (Brucker statement) at 11-12. Senators were assured that prisoner of war provisions reflected established practice "and could start operating when required" without detriment to military operations. *Id.* (Murphy statement) at 5. *See id.* (Brucker statement) at 10 (stating that the Defense Department's "most careful examination" of the

Conventions revealed "nothing which would prejudice the success of our arms in battle"); *id.* (response of J. Lee Rankin, Assistant Attorney General, Department of Justice) at 28 (stating that U.S. "laws with regard to military crimes that would apply to prisoners of war" already were in place). Based on such evidence, the district court below and two other courts deemed the relevant provisions of the Convention to be self-executing. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 164-65 (D.D.C. 2004); *United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002); *United States v. Noriega*, 808 F. Supp. 791, 797 (S.D. Fla. 1992). But there remains division on the question. *Hamdan v. Rumsfeld*, 415 F.3d 33, 38-40 (D.C. Cir. 2005); *see* Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 126-29 (2004) (collecting cases, yet citing "unanimous judicial precedent" that Convention is "supreme federal law").

AR 190-8 renders unnecessary this Court's resolution of the dispute. Treaty terms may be executed by means of duly issued regulations. RESTATEMENT, *supra*, § 111, cmt. h (referring to "implementation by legislation or appropriate executive or administration action"); GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 19 (3d ed. 1996) (indicating that implementation may be by "legislation or regulations"); *accord* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478-01 (Feb. 19, 1999) (codified *passim* in 8 C.F.R. (1999)) (containing rules for enforcement of treaty in domestic litigation). AR 190-8 serves this function. *See* DoD Directive 2310.1 § 1.1 (citing purpose of directive "to ensure implementation of the international law of war,

both customary and codified" regarding prisoners of war); AR 190-8, ¶ 1-1(b) (stating that "[t]his regulation implements international law, both customary and codified, relating to EPW," and listing among the relevant codifications the Third Geneva Convention). AR 190-8 thus has a triple purpose: it stands on its own as U.S. law; it evinces the United States' understanding of legal obligations assumed on ratification of the GPW; and it implements pertinent provisions of that Convention to the extent that any such implementation is required. *See* RESTATEMENT, *supra*, § 111, cmt. h (stating that if an international agreement is judged non-self-executing, "strictly, it is the implementing" mechanism, "rather than the agreement itself, that is given effect as law in the United States"); Jinks & Sloss, *supra*, at 125-26.

C

Trial of petitioner must be by regular court-martial

The government alleges that petitioner was fighting against the United States at the time of his capture in Afghanistan. *See Hamdan*, 415 F.3d at 35. Petitioner thus has a colorable claim to prisoner of war status, and so must receive all the protections of AR 190-8 and the Third Geneva Convention until his legal status is properly decided. To date no such determination has been made. Petitioner's case was reviewed by a "Combatant Status Review Tribunal," a forum founded in the wake of this Court's judgment in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). But that body was authorized only to review classification as an "enemy combatant," and not whether petitioner qualified as a prisoner of war. *See* Mem., Deputy

Sec'y of Defense to Sec'y of Navy, Order Establishing Combatant Status Review Tribunal 3 (July 7, 2004), http:// www.defenselink.mil/news/ Jul2004/d20040707 review.pdf; Mem., Sec'y of Navy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba 1, encl. (1) at 1 (July 29, 2004), http:// www. defenselink. mil /news /2004/ d20040730 comb.pdf.[6] In the absence of any resolution of his prisoner of war status by a "competent tribunal," petitioner must be tried by regular court-martial. GPW arts. 5, 102; AR 190-8 ¶¶ 1-6(b), 3-7(b). The military commission is not an adequate substitute for court-martial. *See* POINT II, *infra*. Created years ago just after a national emergency, the commission applies procedural and evidentiary rules that depart without justification from those established in domestic and international law. *See* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (2001) ("Mil. Ord."). By its very structure – that is, the President's assertion of an executive prerogative to charge, prosecute, and punish defendants without any direct appellate review by this Court – the commission subverts the aim of modern U.S. military justice to "guarantee a trial as free as

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[6] The Court of Appeals below assumed that the executive – that is, the President and later a Combatant Status Review Tribunal – had determined "that Hamdan was not a prisoner of war under the Convention." *Hamdan*, 415 F.3d at 43. In point of fact, the determination made regarded status as an "enemy combatant," a term that is not commensurate with the term "prisoner of war" as used in GPW and AR 190-8. This unfortunate misconstruction contributed to the appellate court's undue disregard of these two binding sources of applicable law.

possible from command influence," *Burns v. Wilson*, 346 U.S. 137, 141 (1953) (plurality opinion).

In re Yamashita, 327 U.S. 1 (1946), counsels no different result. In that decision all Justices treated the 1929 Geneva Convention as directly enforceable; however, a majority held that it did not cover a captive tried by a special U.S. military commission for war crimes occurring before his surrender. *Id.* at 20-26; *see id.* at 18-20 (construing concomitant provisions of UCMJ's statutory precursor to similar effect); *but see id.* at 61-78 (Rutledge, J., joined by Murphy, J., dissenting) (arguing for application of treaty and statute). The Third Geneva Convention both expanded its predecessor's definition of "prisoner of war" and foreclosed the interpretation in *Yamashita*. GPW arts. 85, 102; *see Hearing* (Brucker statement), *supra*, at 9 (approving of GPW's "requirement that prisoners tried either for offenses committed prior to or subsequent to capture, including war crimes, must be tried under the same substantive law and procedure as members of the armed forces of the detaining power"). The 1949 Convention, and eventually AR 190-8, thus reinforced a U.S. military tradition of preferring prisoner of war protections in doubtful cases. *See* PICTET, *supra*, at 54 (noting the observance of laws of war during the American Revolution and Civil War);[7] *Hearing* (Murphy and Brucker statements), *supra*, at 5, 10 (underscoring U.S. adherence to GPW during the

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[7] U.S. rules promulgated while struggling for the very life of the Union advised that "humanity induces" treatment of all captured rebels as prisoners of war. Lieber Code arts. 152-53. Notwithstanding that noncitizens fought for the South, ELLA LONN, FOREIGNERS IN THE CONFEDERACY (1940), the injunction held without regard to a captive's country of birth.

Korean conflict, before U.S. ratification); U.S. Military Assistance Command, Vietnam, Annex A of Directive No. 381-46 (Dec. 27, 1967), *reprinted in Contemporary Practice of the United States Relating to International Law*, 62 AM. J. INT'L L. 754, 766-68 (1968) (discussing grant of prisoner of war status in Vietnam).

That tradition serves military interests. It is a grim fact that American servicemembers today are less likely to suffer capture by a uniformed combatant serving in the regular army of a state party to the Convention than by an adherent to an irregular, paramilitary force – a fighter, perhaps, for the Taliban in Afghanistan, or for the insurgency in Iraq, or for a terrorist network like al Qaeda. To the extent that it denies captives the protection of the laws of war, the United States undercuts its own ability to demand that others obey those laws. Refusal stains the United States' earned image as a country devoted to fair administration of justice, and it places Americans at unwarranted risk of reciprocal injustice at enemy hands. For these reasons petitioner must be tried, as domestic and international laws of war require, by regular court-martial.

II

The military commission is invalid because the President's derogation from generally recognized principles of law and rules of evidence violates requirements established by Congress and the Manual for Courts-Martial

The President initiated the commission via a military order that relied expressly on the UCMJ and

on a joint resolution adopted one week after the attacks of Sept. 11, 2001. Mil. Ord., 66 Fed. Reg. at 57833 (citing as authorities for order Authorization for Use of Military Force Joint Resolution, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF"), and UCMJ arts. 21, 36, 10 U.S.C. §§ 821, 836). The order's wholesale departure from generally recognized principles of law and rules of evidence violates the terms of both those grants of authority and the *Manual for Courts-Martial*, pt. I, ¶ 2(b)(2) (2005) ("MCM"), which requires that, subject to international law and lawfully prescribed regulations, any military commission found to have jurisdiction over a defendant "shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial." Thus even if this Court were to disregard AR 190-8 and the GPW and approve trial outside of courts-martial or civil courts, the military commission remains invalid.

The military order first cited Congress' resolution "[t]hat the President is authorized to use all necessary and appropriate force ... in order to prevent any future acts of international terrorism against the United States," AUMF § 2(a). In *Hamdi*, a bare majority of this Court sustained detention as "'necessary and appropriate'" within the meaning of that resolution. 542 U.S. at 517-18 (O'Connor, J., joined by Rehnquist, C.J., and Kennedy and Breyer, JJ.); *see id.* at 587 (Thomas, J., dissenting) (agreeing that AUMF authorized detention). The plurality supported its conclusion with the observation that "detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war," *id.* at 519; *but see id.* at 549-51 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part) (questioning this application of the law of war in the

context of the case at bar). It gave little additional content to the terms "'necessary and appropriate.'"

In contrast, the second-cited authority, the UCMJ, patently restricts executive action. Along with the Constitution, case law developed in the military and civil courts, and regulatory law such as the MCM, this fifty-five-year-old code governs the conduct of American courts-martial. The result is a military justice system whose procedural and evidentiary rules largely conform to those that prevail in civil courts. *See* Kevin J. Barry, *A Face Lift (and Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, 2002 L. REV. MICH. ST. U. DET. C.L. 57, 69-83. Nonconforming rules are disfavored; UCMJ art. 36(a), 10 U.S.C. § 836(a), states:

> Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

Congress thus conditioned derogation from fair-trial guarantees on satisfaction of two requirements. First, departure must be supported by an adequate

presidential determination that conformity is impracticable. *See United States v. Ezell*, 6 M.J. 307, 313 (C.M.A. 1979) (imposing burden of showing need on party requesting rule different from that in civil courts). Second, the departure may not be "contrary to or inconsistent with" statutory or constitutional law. *See United States v. Wimberley*, 36 C.M.R. 159, 167 (C.M.A. 1966) (considering the Constitution, as well as the UCMJ, within Art. 36(a)'s consistency requirement); MCM, pt. I, ¶ 2(b)(2). *Accord* Fidell, Sullivan & Vagts, *supra*, at 48 ("In sum, and reading Art. 36(a) and paragraph 2(b)(2) of the MCM together, military commission rules should follow broadly if not in every particular, the procedures and rules for courts-martial."). The failure of the President to meet either condition violates settled law and renders the military commission invalid.[8]

A

The President has not given legally sufficient reasons for abandoning settled fair-trial rules

Article 36(a) requires the President to comply with generally recognized fair-trial rules to the extent "practicable" – a term that denotes feasibility in particular, identified circumstances. *See* THE

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[8] To the extent that compliance with fair-trial rules is "practicable," UCMJ art. 36(a), departure from such rules cannot be "necessary" within the meaning of the AUMF. Similarly, a principle of law or evidentiary rule "contrary to or inconsistent with" U.S. law, again quoting Art. 36(a), cannot be "appropriate" within the meaning of the AUMF. The analysis that follows, though centered on Art. 36(a), thus applies with equal force to the AUMF.

AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1421 (3d ed. 1992) (defining "practicable" as "[u]sable for a specific purpose"); *accord* UCMJ art. 33, 10 U.S.C. § 833 (employing term in case-specific context); Fed. R. Evid. 103(c) (same). The President does not enjoy absolute discretion to make the practicability determination; rather, he must articulate reasons for his decision sufficient to show that he has acted neither arbitrarily nor capriciously. *See* Eugene R. Fidell, *Judicial Review of Presidential Rulemaking Under Article 3o. The Sleeping Giant Stirs*, 4 MIL. L. RPTR. 6049, 6057-59 (1976); *accord* Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (requiring courts to invalidate "agency action, findings, and conclusions" if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); Gregory E. Maggs, *Judicial Review of the Manual for Courts-Martial*, 160 MIL. L. REV. 96, 106-07 (1999) (endorsing consultation of administrative law, like that of this Court in *Loving*, 517 U.S. at 768-73, to evaluate military rules issued by President). In keeping with these principles, this Court recently scrutinized the adequacy of asserted reasons for presidential prescription of a military rule at odds with the Federal Rules of Evidence. *United States v. Scheffer*, 523 U.S. 303, 309-15 (1998); *see id.* at 307 n.2 (quoting Art. 36(a)). Finding no evidence that "the President acted arbitrarily or disproportionately," the Court sustained the nonconforming rule as "a rational and proportional means of advancing the legitimate interest," *id.* at 312.

The President conceded these constraints when he invoked the UCMJ as authority for his order on military commissions. Mil. Ord., 66 Fed. Reg. at

57833;[9] *accord Service v. Dulles*, 354 U.S. 363, 380 (1957) (limiting discretion of Secretary of State pursuant to regulations he judged applicable). Indeed, the order purported to make a finding "that it is not practicable to apply in military commissions" settled fair-trial rules, "[g]iven the danger to the safety of the United States and the nature of international terrorism," Mil. Ord. § 1(f), 66 Fed. Reg. at 57833. That conclusory statement falls well short of what Art. 36(a) requires. Far from the particularized finding based on specific circumstances that the statutory term "practicable" demands, the statement endeavors to effect a blanket avoidance of the UCMJ's conformity requirement. Although "safety" from the "danger" of "terrorism" is of course a legitimate governmental goal, the order failed to explain how suspension of fair-trial rules would advance that interest. In point of fact it would have been impossible to show a rational fit between means and end: the statement preceded the first order on precise procedures by several months, and the first tender of actual charges by more than two years. *See* Dep't of Defense, Mil. Comm'n Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism at 1 (Aug. 31, 2005) (superseding the first procedures order, published on Mar. 21, 2002), http:// www.defenselink.mil/news/Sep2005/d20050902

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[9] In addition to Art. 36(a), he relied on Art. 21, 10 U.S.C. § 821, which states that courts-martial may share jurisdiction over "offenders or offenses that by statute or by the law of war may be tried by military commissions ...." The arguments set forth in this brief demonstrate that neither congressional enactment nor the law of war permits trial of petitioner by the commission that was established in the President's order.

order.pdf ("MCO 1"); Neil A. Lewis, *U.S. Charges Two at Guantánamo with Conspiracy*, N.Y. TIMES, Feb. 25, 2004, at A1. The passage of time and the remoteness of Guantánamo from the battlefield where petitioner is said to have been seized further call into question the asserted need to derogate. *Accord Rasul v. Bush*, 542 U.S. 466, 488 (2004) (Kennedy, J., concurring) (stating with respect to detention that spatial and temporal distance "from a zone of hostilities" weakens claims of "military necessity"). Failing to supply a rational justification for denying fundamental fair-trial rights, the President acted arbitrarily and disproportionately. The military order of derogation is invalid; so too the commission it would establish.

B

Military commission procedures and rules of evidence deny fair-trial rights basic to the domestic and international law of war, and thus are impermissibly "contrary to or inconsistent" with the UCMJ

A signal development in contemporary rule of law is the enforcement of the rights of the accused. Rulings of this Court have established that the Constitution guarantees defendants an independent and impartial arbiter, *Coolidge v. New Hampshire*, 403 U.S. 443, 450-53 (1971); freedom from compelled self-incrimination, *Malloy v. Hogan*, 378 U.S. 1, 3 (1964); and freedom from conviction via evidence obtained either by coercion, *Brown v. Mississippi*, 297 U.S. 278, 285-87 (1936), or by unreasonable search or seizure, *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). Defendants must be afforded the assistance of effective counsel,

Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963), as well as the rights to confront adverse witnesses, *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004), and secure favorable ones, *Washington v. Texas*, 388 U.S. 14, 18 (1967), at proceedings that occur speedily, *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967), and in public, *In re Oliver*, 333 U.S. 257, 269-73 (1948). Parallel developments over the past half-century, in other countries and in regional and international declarations, treaties, and jurisprudence, have resulted in a global entrenchment of fair-trial rights. Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 IND. L.J. 809, 813-15, 823-45 (2000).

The laws of armed conflict are part and parcel of this trend. Soon after a divided Court sustained a conviction by a military commission whose proceedings fell far short of contemporary due process requirements,[10] the Third Geneva Convention made explicit certain fundamental protections to which prisoners of war were entitled. GPW arts. 82-108; *see Hearing* (Murphy statement), *supra*, at 3 (stating, in remarks by State Department official, that one of GPW's "improvements" is that it "provides for fair-trial procedures"). The Convention further mandated that even persons not qualifying for prisoner of war

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10 *Compare Yamashita*, 327 U.S. at 18-26 *with id.* at 26-41 (Murphy, J., dissenting) *and id.* at 41-47, 56-81 (Rutledge, J., dissenting); *accord* Patricia M. Wald, *Rules of Evidence in the Yugoslav War Tribunal*, 21 QUINNIPIAC L. REV. 761, 770 (2003) (stating hope "that current international law tribunals not devolve into the kind of *Yamashita* trial the famous dissenters, Justices Murphy and Rutledge (and probably history as well), condemned").

status "be treated humanely," and not punished absent "previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." GPW art. 3(1)(d). Regional bodies applied such principles to hold special military court convictions unjust. *See* Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263, 329-35 (2004) (discussing opinions of African Commission on Human and Peoples' Rights, Inter-American Court of Human Rights, and European Court of Human Rights, as well as the United Nations' Human Rights Committee). A robust set of rights is extended as a matter of routine in tribunals established – with considerable U.S. support – to adjudicate "serious violations" of the laws of war. *E.g.*, Statute of the International Criminal Tribunal for the Former Yugoslavia, arts. 1, 10, 12-13, 21, 23, 25, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., Annex, U.N. Doc. S/RES/827 (1993), as amended (2003), http://www.un.org/icty/legaldoc-e/index.htm; International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, IT/32/REV.36 (2005), http: //www.un.org/icty/legaldoc-e/basic/rpe/ procedure index. htm ("ICTY Rule"). Today's "common law of war," *see* Lieber Code art. 13, thus requires that criminal proceedings be fundamentally fair.

U.S. military justice has kept pace with this trend toward greater protections for the accused, a fact that owes much to the enactment in 1950 of the UCMJ. As this Court explained, the UCMJ "reflect[s] an effort to reform and modernize the system – from top to bottom," in response to "objections and criticisms lodged against court-martial procedures in the aftermath of World War II." *Burns*, 346 U.S. at 140-41

(plurality opinion). The UCMJ instituted a layered system of review by military courts and by the civilian court now known as the United States Court of Appeals for the Armed Forces. *See id.* at 141; UCMJ arts. 59-67, 141-45, 10 U.S.C. §§ 859-67, 941-45. The system was further strengthened in 1983, when Congress made the decisions of those courts subject to certiorari review by this Court. Military Justice Act of 1983, § 10, Pub. L. 98-209, 97 Stat. 1393 (1983) (codified at 28 U.S.C. § 1259); *see* Barry, *supra*, at 71-82. Accompanying these innovations was recognition that the Bill of Rights protects persons subject to the UCMJ. *E.g.*, *United States v. Kemp*, 32 C.M.R. 89, 97 (C.M.A. 1962) (writing that servicemembers are entitled to "the full protection against self-incrimination afforded by the Fifth Amendment"); *United States v. Sojfer*, 47 M.J. 425, 428 (C.A.A.F. 1998) (ruling that defendant in court-martial has a "Sixth Amendment right to cross-examine opposing witnesses"); *see* Maggs, *supra*, at 146-55 (collecting cases). Adoption of military rules much like the Federal Rules of Evidence – no less than the *Manual* in which those rules may be found – also contributed to the creation of a military justice system substantially similar to that in the federal courts.

In stark contrast stand the procedures and evidentiary rules of the military commission, as three examples illustrate.

First is the structure of decisionmaking. The commission owes its existence to the President; the members owe their offices to the President's designee. *See* Mil. Ord. § 4; MCO 1 §§ 2, 4. Petitioner was named an "enemy combatant" by the President, who, as Commander in Chief, U.S. CONST., art. II, § 2,

continues to campaign against the same enemy. In lieu of the UCMJ's hierarchy of military review with recourse to this Court, MCO 1 § 6(H)(6) gives the last word on the validity of a conviction to the President. This structure creates a grave risk that petitioner's cause will not be heard "with that calm degree of dispassion essential to a fair hearing on the question of guilt," *Burns*, 346 U.S. at 145, and so will violate both domestic and international law. *E.g.*, International Covenant on Civil and Political Rights, art. 14(5), Dec. 16, 1966, 999 U.N.T.S. 171; PICTET, *supra*, at 43 (situating at core of modern humanitarian law the guarantee of a court "presenting the requisite conditions of impartiality").

Second is the matter of petitioner's participation in the proceedings. The commission has vast discretion to close hearings, even to a defendant and his civilian defense counsel; to consider statements of absent witnesses; and to keep witnesses' identities secret. MCO 1 §§ 4(C)(3)(b), 6(B)(3), 6(D)(2)(d), 6(D)(5). These limitations unduly encroach on petitioner's rights to public proceedings and to confront witnesses against him. *See Hamdan*, 344 F. Supp. 2d at 167-72; UCMJ arts. 39, 49-50, 10 U.S.C. §§ 839, 849-50 (guaranteeing accused right to be present at trial, and detailing procedures for use of witness statements); *Kostovski v. Netherlands*, 166 Eur. Ct. H.R. (ser. A.) (1989) (holding that state's curtailment of right to examine witnesses deprived defendant of fair-trial guarantees of Europe's human rights convention).

Third is the question of evidence. Military and federal courts alike must exclude even relevant evidence if it is unduly prejudicial or unreliable or if

admission would contravene social policy. *See, e.g.*, Fed. R. Evid. 403; Mil. R. Evid. 403; 1 STEPHEN A. SALTZBURG, LEE D. SCHINASI & DAVID A. SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL 4-23 to 4-74 (5th ed. 2003). The military rules go so far as to codify the ban on the use of confessions obtained by means of "coercion, unlawful influence, or unlawful inducement." Mil. R. Evid. 304(a), (c)(3); SALTZBURG, SCHINASI & SCHLUETER, *supra*, 3-93 to 3-148. Instead of this complex of constraints, just one rule guides the commission: "Evidence shall be admitted" as long as it "would have probative value to a reasonable person." MCO 1 § 6(D)(1); *see* Mil. Ord. § 4(c)(3). This command creates an undue danger of conviction based on unreliable and unjust evidence, in violation not only of domestic but also of international legal standards. *See A v. Sec'y of State for the Home Dept.* [2005] UKHL 71, [2005] All ER (D) 124 (Dec) (interpreting international treaty to forbid admission of testimony procured by torture); ICTY Rule 95 ("No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.")

In sum, application of the procedural and evidentiary rules prescribed for the military commission would deprive petitioner of fundamental fair-trial rights. These rules are contrary to and inconsistent with the UCMJ. *See* UCMJ Art. 36(a), 10 U.S.C. § 836(a). They do not correspond with rules applicable in American courts-martial or under international law, *see* MCM, pt. I, ¶ 2(b)(2); such variance from fundamental incidents of the laws of war is neither "'necessary'" nor "'appropriate,'" *see Hamdi*, 542 U.S. at 519 (plurality opinion) (quoting

AUMF). Because the military commission rules deviate impermissibly from settled law they, and the commission itself, are invalid.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed and the case remanded with instructions to enter judgment for petitioner.

Respectfully submitted,

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